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IN THE UNITED STATES DISTRICT COURT

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FOR THE NORTHERN DISTRICT OF CALIFORNIA

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**STATE OF CALIFORNIA BY AND THROUGH
ATTORNEY GENERAL XAVIER BECERRA AND
CALIFORNIA STATE WATER RESOURCES
CONTROL BOARD, STATE OF NEW YORK,
STATE OF CONNECTICUT, STATE OF ILLINOIS,
STATE OF MAINE, STATE OF MARYLAND,
STATE OF MICHIGAN, STATE OF NEW JERSEY,
STATE OF NEW MEXICO, STATE OF NORTH
CAROLINA EX RE. ATTORNEY GENERAL
JOSHUA H. STEIN, STATE OF OREGON, STATE
OF RHODE ISLAND, STATE OF VERMONT,
STATE OF WASHINGTON, STATE OF
WISCONSIN, COMMONWEALTHS OF
MASSACHUSETTS AND VIRGINIA, THE NORTH
CAROLINA DEPARTMENT OF
ENVIRONMENTAL QUALITY, THE DISTRICT OF
COLUMBIA, AND THE CITY OF NEW YORK,**

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Plaintiffs,

v.

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**ANDREW R. WHEELER, AS ADMINISTRATOR
OF THE UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY; UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY; R.
D. JAMES, AS ASSISTANT SECRETARY OF THE
ARMY FOR CIVIL WORKS; AND UNITED
STATES ARMY CORPS OF ENGINEERS,**

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Defendants.

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Case No. 3:20-cv-03005-DMR

DECLARATION OF REBECCA ROOSE

Date:
Time:
Courtroom:
Judge:
Trial Date:
Action Filed:

DECLARATION OF REBECCA ROOSE

I, Rebecca Roose, state and declare as follows:

1. My name is Rebecca Roose. I am over 21 years of age and am fully competent and duly authorized to make this Declaration. The facts contained in this Declaration are based on my personal knowledge and are true and correct.

2. I submit this declaration in support of the motion by the States and Cities for a preliminary injunction. As discussed below, the WOTUS Rule will have a devastating impact on New Mexico's waters and the State is in no position to fill the regulatory vacuum left by EPA and the Army Corps as a result of that rule.

BACKGROUND

3. I am employed as the Director of the Water Protection Division of the New Mexico Environment Department (Department). In my role, I oversee the Department's Ground Water Quality, Surface Water Quality, Drinking Water, and Construction Programs Bureaus. I have been employed by the Department for approximately one year. Prior to joining the Department, I worked for the U.S. Environmental Protection Agency (EPA). At EPA Headquarters, I devoted 13 years to supporting EPA, states, and tribes with implementation of Clean Water Act (CWA) programs. Specifically, I drafted and defended National Pollutant Discharge Elimination System (NPDES) program regulations and effluent limitations guidelines promulgated pursuant to CWA Section 402, provided oversight of states' implementation of NPDES, pretreatment and CWA Section 319 nonpoint source control programs, and developed policy and training for compliance inspections of NPDES permittees and CWA Section 311 spill prevention, control and countermeasures facilities. During my tenure at EPA, I served as a national expert on NPDES requirements for Concentrated Animal Feeding Operations, NPDES program requirements for authorized states and tribes, and NPDES compliance monitoring policy. I earned my law degree and natural resources law certificate from the University of New Mexico in 2004.

4. The purpose of the Department is “to ensure an environment that in the greatest possible measure will confer optimum health, safety, comfort and economic and social well-being on its inhabitants; will protect this generation as well as those yet unborn from health threats posed by

the environment; and will maximize the economic and cultural benefits of a healthy people.”

N.M. STAT. ANN. § 74-1-2 (1997).

5. The Department serves as agent of the State in matters of environmental management and consumer protection. N.M. STAT. ANN. § 74-1-6(E) (2009). The Department has primary responsibility for implementing the activities of the New Mexico Water Quality Control Commission, the state water pollution control agency for purposes of the federal CWA.

THE WOTUS RULE'S HARM TO NEW MEXICO WATERS

6. New Mexico has seven traditionally navigable waters (TNWs): the Rio Grande, the Canadian River, the San Juan River, the Cimarron River, the Rio Chama, the Pecos River, and Navajo Lake. The U.S. Army Corps of Engineers (USACE) has attempted to designate the entire stretch of the Gila River that flows through New Mexico as a TNW, but this designation has been challenged and to date remains unresolved. In its review of the National Hydrology Dataset, the Department has determined that approximately 89% of the State's rivers and streams are ephemeral, 7% are perennial, and 4% are intermittent. Under the WOTUS Rule, none of the ephemeral streams will be protected by the CWA.

7. The WOTUS Rule will also result in the loss of many wetlands in New Mexico. Saint Mary's University of Minnesota's Geospatial Services, with input from the Department, created a model to evaluate the extent of federally protected wetlands and other surface waters in the Cimarron River Watershed.¹ The results of this case study show that by narrowing the scope of federal jurisdiction, the number of wetlands protected by the CWA is substantially decreased, leading to a likely loss of benefits provided by wetlands such as flood control and attenuation, pollution control, wildlife habitat, and recreation. Depending on how the new WOTUS rule is applied, 20-70% of the wetlands in the Cimarron River Watershed would lose CWA protections.

8. To represent benefit-cost analyses of the WOTUS Rule, EPA and USACE (collectively the “Agencies”) relied on three case studies in the supporting Economic Analysis, “to explore

¹ For details of the Saint Mary's University of Minnesota model, visit <https://www.arcgis.com/apps/Cascade/index.html?appid=f3de6b30c0454c15ac9d3d881f18ae33>.

(continued...)

1 potential changes and resulting forgone benefits and avoided costs.”² The case studies focused on
 2 three geographical regions – the Ohio River Basin, the Lower Missouri River Basin, and the Rio
 3 Grande River Basin – that intersect 10 states. The Rio Grande River Basin was divided into two
 4 major watersheds, the Upper Pecos (HUC 1306) and Lower Pecos (HUC 1307) River Basins,
 5 which contain a combined 44,300 square miles in New Mexico and Texas from east of Santa Fe,
 6 New Mexico to the confluence of the Pecos River and Rio Grande at the Texas-Mexico border.
 7 This case study found 85% of stream miles within the Upper Pecos River Basin in New Mexico
 8 are ephemeral, and 34% of all wetland acres to be “non-abutting” wetlands. These ephemeral
 9 waters and non-abutting wetlands in the Upper Pecos River Basin will no longer be protected
 10 under the WOTUS Rule. Further, the cost analysis for the Pecos River case study shows benefits
 11 of the WOTUS Rule to be minimal or negligible; however, the Agencies did not quantify or
 12 monetize the environmental effects and forgone benefits of the WOTUS Rule for the Rio Grande
 13 River Basin case study, blaming this deficiency on limitations in the data. The *Economic Analysis*
 14 of the EPA-Army Clean Water Rule³ monetized the ecosystem services and benefits from
 15 wetlands, so it is possible to evaluate this important component of any new rule. In fact, the
 16 estimation of nonmarket environmental values is not new – one notable example is compensation
 17 for the 1989 Exxon Valdez oil spill in the Gulf of Alaska. It is well known that wetlands provide
 18 many ecological and economic benefits to watersheds such as filtering and improving water
 19 quality, flood attenuation, erosion control, carbon sequestration, aquifer recharge, and providing
 20 fish and wildlife habitat and nurseries.⁴ It is also known that ephemeral waters are ecologically
 21 and hydrologically significant in arid and semi-arid watersheds of the southwestern United
 22 States.⁵ Loss of environmental protections for ephemeral streams and wetlands, reductions in
 23

24 ² Economic Analysis for the Navigable Waters Protection Rule: Definition of “Waters of the United States.” U.S.
 Environmental Protection Agency and U.S. Department of the Army. January 22, 2020.

25 ³ Economic Analysis of the EPA-Army Clean Water Rule. U.S. Environmental Protection Agency and U.S.
 Department of the Army. May 20, 2015. Available at: https://www.epa.gov/sites/production/files/2015-06/documents/508-final_clean_water_rule_economic_analysis_5-20-15.pdf

26 ⁴ <https://www.epa.gov/sites/production/files/2016-02/documents/wetlandfunctionsvalues.pdf>

27 ⁵ Levick, L., et al. 2008. The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the
 Arid and Semi-arid American Southwest. U.S. Environmental Protection Agency and USDA/ARS Southwest
 Watershed Research Center, EPA/600/R-08/134, ARS/233046, 116 pp.

1 water quality, and cumulative impacts will be devastating to wildlife and humans who are
 2 dependent on these waters, especially at the local scale, and should have been quantified.

3 9. Because of the ephemeral exemption and new definition of “adjacent wetland,” the
 4 WOTUS Rule will create a significant gap in regulation under CWA Section 402 general permits
 5 (i.e., construction and industrial stormwater discharges) and CWA Section 404 dredge and fill
 6 permits in ephemeral streams and non-abutting wetlands. The Agencies considered the potential
 7 effect of the WOTUS Rule on issuance of CWA Section 402 permits for stormwater from
 8 construction activities. Overall, the Agencies concluded that the ephemeral exemption would
 9 likely change circumstances in arid and semi-arid states where many streams are ephemeral, and
 10 CWA protections would be removed from the vast majority of waters in these states.⁶ As a result,
 11 many construction sites in arid states will not be required to obtain NPDES permit coverage for
 12 stormwater discharges. Dredge and fill and industrial activities in ephemeral streams will not
 13 need a CWA Section 404 permit. Besides excess sediment, which can smother bottom-dwelling
 14 organisms, fill deep pools that are critical refugia during summer and drought, and clog or injure
 15 gills of fish, stormwater carries other harmful pollutants. Construction, industrial, and urban sites
 16 generate pollutants such as phosphorus and nitrogen from the application of fertilizer, various
 17 metals (arsenic, cadmium, chromium, copper, zinc), acidic wastewaters, pesticides, phenols,
 18 paints, solvents, phthalates, petroleum products, and solid wastes that attach to sediment and/or
 19 get washed into streams and wetlands during overland stormflows. Sediment loading rates from
 20 constructions sites are typically 10 to 20 times that of agricultural lands and 1000 to 2000 times
 21 that of forest lands. Even a small amount of construction or industrial activity may have a
 22 significant negative impact on water quality in localized areas if permits are not required and
 23 proper management practices are not implemented to reduce or eliminate pollutants in
 24 stormwater. New Mexico has over a thousand facilities covered by stormwater general permits
 25 and approximately 25-45% of these will no longer be subject to those stormwater management
 26 requirements as a result of the WOTUS Rule.

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⁶ Economic Analysis for the Navigable Waters Protection Rule: Definition of “Waters of the United States.” U.S.
 Environmental Protection Agency and Department of the Army. January 22, 2020.

1 10. The WOTUS Rule will also create a significant gap in regulation of individual permits
2 issued by EPA under CWA Section 402 in New Mexico. The Agencies did not effectively
3 consider the potential effect of the WOTUS Rule on issuance of CWA Section 402 individual
4 permits for discharges to ephemeral or other non-jurisdictional waters under the WOTUS Rule.
5 New Mexico currently has 115 individual, EPA-issued NPDES permits in the State, including
6 permits issued in Indian Country. Under the 2020 Rule, approximately 50% of these current
7 permittees will no longer be required to obtain an NPDES permit because they discharge to
8 receiving streams that lose CWA protections. Examples of facilities in New Mexico that would
9 no longer discharge pursuant to NPDES individual permit requirements include: municipal and
10 private domestic wastewater treatment plants; tribal and Bureau of Indian Affairs wastewater
11 treatment plants; multiple types of mines, both active and in reclamation (coal, uranium, cement,
12 rock, minerals and metals); national laboratories; federal facilities; fish hatcheries; and oilfield
13 sanitary waste treatment plants. Eliminating CWA protections will degrade ephemeral water
14 quality and the downstream TNWs and other jurisdictional waters that they feed.

15 11. The Department has relied upon the Agencies' broad interpretation of WOTUS under the
16 1980s regulations and the *Rapanos* Guidance in order to ensure protection of New Mexico's
17 waters.

18 12. The WOTUS Rule's ephemeral exemption will have a disproportionate effect on water
19 quality in the arid Southwest (e.g., Arizona, Nevada, and New Mexico) because many stormwater
20 discharges from sites into ephemeral streams will no longer be subject to CWA permits. New
21 Mexico is one of the driest states, averaging less than twenty inches of annual precipitation.
22 Ephemeral streams provide the same ecological and hydrological benefits as perennial streams by
23 moving water, sediment and nutrients through the system to be utilized downstream. Ephemeral
24 flows are in need of CWA protection because when they are functioning properly they provide
25 important hydrologic connections across the landscape and across geopolitical boundaries; they
26 dissipate stream energy during high flow events to reduce erosion, thus improving water quality;
27 they recharge aquifers where water can be stored for current and future drinking water supplies;
28 they transport, store and deposit sediment to help maintain floodplains; they transport, store and

1 cycle nutrients for vegetation, wildlife and aquatic life; and they support and provide migration
2 corridors. Given the distribution of ephemeral streams in New Mexico (89% of streams) and their
3 important hydrological and ecological functions, cumulative impacts of ephemeral streams
4 throughout a watershed must be considered in order to protect and maintain water quality and
5 watershed health. Removing protections from ephemeral streams will degrade water quality in the
6 jurisdictional waters that they feed.

7 13. Science has clearly demonstrated that ephemeral waters are ecologically and
8 hydrologically significant in the arid southwestern United States. In New Mexico, ephemeral
9 tributaries contribute up to 76% of the stormflow in the Rio Grande after a storm event. Where
10 pollutants can be mobilized, ephemeral stormflows will deliver the pollutants to downstream
11 waters, such as the Rio Grande – a TNW. The cumulative impacts of these non-jurisdictional
12 ephemeral stormflows are detrimental to downstream water quality and threaten human health
13 and the environment.

14 14. More frequent droughts and shifting precipitation patterns due to climate change result in
15 lower water levels in rivers, lakes, and streams, leaving less water to dilute pollutants. In addition,
16 more frequent and more powerful storms increase polluted runoff from urban and agricultural
17 areas, which transports pollutants from the landscape to nearby waterways. These changes will
18 stress aquatic ecosystems and dramatically impact communities throughout the United States,
19 especially in the Southwest. Community impacts include threats to public health, economic strain,
20 and decreased quality of life. The effects of climate change in New Mexico amplify the
21 complexities of western water management. A lack of connectivity or perenniability today or in a
22 “typical year” is not a suitable feature that EPA, USACE and New Mexico can rely upon to
23 define a jurisdictional water.

24 15. Tijeras Arroyo presents an example of the anticipated devastating effects of the WOTUS
25 Rule on water quality. This waterway winds for 26 miles from its headwaters in the Sandia and
26 Manzano Mountains east of Albuquerque, New Mexico through developed and undeveloped
27 areas of Albuquerque in the foothills, including Kirtland Air Force Base, before entering the Rio
28 Grande. The waterway is perennial in the headwaters but is ephemeral for 11 miles as it flows out

1 of the mountains and into the Rio Grande. Tijeras Arroyo is a major tributary of the Rio Grande
2 in the Albuquerque area and carries stormwater, and any pollutants mobilized by stormwater, to
3 the Rio Grande during significant rain events. It is the subject of (1) a Watershed Restoration
4 Action Strategy to address excess *E. coli* bacteria and sedimentation through stormwater
5 management and erosion controls; (2) a Total Maximum Daily Load (TMDL) to reduce
6 watershed nutrient loading during both low-flow and high-flow events; and (3) federal permits
7 including several CWA Section 404 permits, an individual NPDES permit for Kirtland Air Force
8 Base, and the Municipal Separate Storm Sewer System (MS4) permit for the Albuquerque-
9 Bernalillo County area under CWA Section 402. These various permits and requirements limit
10 and/or monitor the discharge of the following pollutants into Tijeras Arroyo: nitrate-nitrogen,
11 ammonia-nitrogen, total nitrogen, total phosphorus, ethylene dibromide (EDB), heptachlor, per-
12 and polyfluoroalkyl substances (PFAS), total residual chlorine, total suspended solids, biological
13 oxygen demand, and oil and grease. In addition, the Rio Grande downstream of Tijeras Arroyo is
14 impaired for *E. coli* bacteria, polychlorinated biphenyls (PCBs) in fish tissue, and dissolved
15 oxygen. Tijeras Arroyo was jurisdictional under the 1980s regulations, the 2008 Rapanos
16 Guidance, and the 2019 Rule but is not jurisdictional under the 2020 WOTUS Rule. Surface
17 water quality is also a major concern for the two acequia associations in the Tijeras watershed and
18 the Pueblo of Isleta, which is downstream of Tijeras Arroyo and the City of Albuquerque. Under
19 the WOTUS Rule, these CWA protections (e.g., *E. coli* strategy, TMDL, NPDES permits) will
20 not be enforceable as is. They will either be modified to move the point of discharge to a
21 jurisdictional water and consequently dilute the limitations and requirements, or they will be
22 terminated.

23 16. Another example of the WOTUS Rule's harm is the Gila River, which originates in the
24 Nation's first designated wilderness area (the Gila National Wilderness) and is the last major wild
25 and free-flowing river in New Mexico. The Gila River supports a remarkable abundance of
26 aquatic life and wildlife, provides significant economic value to the region through abundant
27 outdoor recreation opportunities, and is culturally important to indigenous peoples who have lived
28 in southwestern New Mexico for thousands of years. The Gila River flows from New Mexico into

1 Arizona and typically goes dry before it reaches the Colorado River due to large irrigation
 2 diversions, groundwater mining, and sustained drought. Some segments of the Gila River in
 3 Arizona have been designated as TNWs, but the Gila River is not a designated TNW in New
 4 Mexico. New Mexico's Gila River was named by American Rivers as the country's most
 5 endangered river in 2019 because of threats from water diversions and climate change.⁷ If the
 6 new WOTUS Rule is implemented, the Gila River in New Mexico would not be protected by the
 7 CWA, further endangering this precious resource.

8 17. The Rio Hondo Watershed in south-central New Mexico is yet another example of the
 9 irreparable harm the WOTUS Rule will have on New Mexico. As the perennial headwaters of the
 10 Rio Ruidoso and Rio Bonito flow downstream, they become interrupted and eventually go
 11 underground along several ephemeral segments. Because the ephemeral segments are
 12 substantially long (over 50 miles), it is highly unlikely that the Rio Ruidoso, Rio Bonito or
 13 upstream portions of the Rio Hondo have a surface connection to the Pecos River (a TNW) in a
 14 "typical year." Therefore, everything upstream of these ephemeral breaks/segments would be
 15 considered non-jurisdictional under the WOTUS Rule. In this watershed there are several
 16 facilities that would no longer be required to obtain a NPDES permit to discharge to the river,
 17 including the Ruidoso Downs Wastewater Treatment Plant and the Ruidoso Racetrack. The Rio
 18 Ruidoso already exceeds water quality standards for total nitrogen and total phosphorus, two
 19 pollutants that are controlled by the aforementioned NPDES permits. Historically, excess nitrogen
 20 and phosphorus have negatively impacted downstream irrigation uses. Further, construction and
 21 industrial sites would not be required to obtain NPDES permit coverage for their stormwater
 22 discharges. This means industrial facilities and construction sites could discharge pollutants into
 23 the river without consequence under federal law. Loss of federal pollution control for the Rio
 24 Ruidoso could result in polluted water conveyed to local farms via the 82 acequias, or community
 25 ditches, in this area. Acequias have important historical and cultural value in New Mexico, with
 26 many dating to the 17th and 18th Centuries, and provide essential water for agriculture. Public
 27

28 ⁷<https://www.americanrivers.org/2019/04/americas-most-endangered-rivers-of-2019-spotlights-climate-change-threats/>

health and the environment will be directly impacted by the federal rollback and unregulated pollutant discharges in the Rio Hondo Watershed.

3 18. Because the vast majority of New Mexico's waters are ephemeral and large numbers of
4 wetlands will lose protections, the WOTUS Rule will have a profound adverse effect on water
5 quality in the state. In much of the country, ephemerality of rivers is typically seen in the upper
6 watershed where impacts of the proposed rule may be minimal. That is not the case in the arid
7 West. By removing protections for ephemeral waters, waters like the Santa Fe River, Rio
8 Ruidoso, Jemez River, Rio Puerco, Tijeras Arroyo, and Rio Grande tributaries on the Pajarito
9 Plateau (which contain legacy contamination from the Manhattan Project) will have severed and
10 interrupted jurisdiction in the middle and lower reaches. This will create a patchwork of
11 jurisdictional and non-jurisdictional segments along the path of a river that will make it nearly
12 impossible to implement an effective water quality protection program. A patchwork of
13 unregulated contamination will have serious public health and economic consequences related to
14 drinking water supplies, cultural and agricultural uses, recreational uses, and aquatic species and
15 wildlife.

DIFFICULTIES OF FILLING THE FEDERAL REGULATORY GAP WITH STATE PROGRAMS

18 19. New Mexico cannot, as a practical matter, fill the regulatory gap created by the WOTUS
19 Rule. The WOTUS Rule disproportionately impacts states that do not have authority to operate
20 the NPDES permitting program under CWA Section 402. This program is the primary
21 mechanism under the Act for regulating and limiting discharges of pollutants into the “waters of
22 the United States.” Further, the WOTUS Rule disproportionately impacts arid states that have
23 many ephemeral waters. The State of New Mexico fits both these characterizations and is
24 therefore particularly adversely impacted by the WOTUS Rule.

25 20. The Agencies state, “[a]bsent CWA jurisdiction, states and tribes can still choose to
26 regulate waters irrespective of federal mandates.” While in theory this may be true, in practice
27 this is impossible for states without NPDES authority or an established state permitting program.
28 New Mexico is one of only three states without NPDES authority, and the only such state in the

1 west. While the Department is interested in having EPA authorize New Mexico to implement the
2 NPDES program, adopting and implementing such a program requires significant time, funding,
3 and staff. Unlike most states with established NPDES programs, New Mexico does not have the
4 legal and procedural program infrastructure to issue NPDES-like permits to regulate discharges of
5 pollutants to surface waters of the state that are not WOTUS under the new definition. As laid out
6 above, the Department estimates that 50% of NPDES individual permits and 25-45% of
7 stormwater general permits will not be required under the 2020 Rule amounting to hundreds of
8 unregulated discharges in New Mexico as a result of the federal rollback, creating a burdensome
9 federal regulatory gap that the state is expected to fill to protect its surface waters and its citizens.

10 21. The WOTUS Rule imposes significant resource burdens on the Department while putting
11 the health of New Mexico waters at great risk. The premise that all states are capable of
12 addressing water quality issues in their state is false. Not all states can implement a robust and
13 successful water quality program without significant federal assistance. Recurring federal and
14 state funds need to be identified to support a New Mexico surface water discharge permitting
15 program because reasonable permit fees would not cover the costs of the program in New
16 Mexico. Federal financial support for pollution control programs has been steadily declining over
17 the past decade to the detriment of New Mexico's precious surface waters.

18 22. To prevent water quality degradation in State surface waters from the rollback of CWA
19 protections, the Department will be required to expand the Surface Water Quality Bureau and
20 develop a State surface water permitting program. The Department lacks sufficient funding to
21 expand the Bureau and implement a permitting program as the WOTUS Rule goes into effect. In
22 addition, expansion and funding requests are dependent on approval from the State legislature.
23 With no new funding associated with this substantial shift in CWA jurisdiction, oversight of
24 WOTUS Rule implementation will force the Department to pull resources from current Surface
25 Water Quality Bureau priorities, such as ambient water quality monitoring, assessment and
26 reporting on the status of the state's surface waters, water quality standards revisions, water
27 quality management and watershed-based planning, watershed and wetland restoration, and
28 program and project effectiveness monitoring. In fulfilling its mission to preserve, protect and

1 improve surface water quality across our state, the Department will be harmed by the WOTUS
 2 Rule due to the need to redirect already strained resources, inadequate resources to implement an
 3 effective permitting program, and uncertain legislative and federal support.

4 23. The WOTUS Rule introduces great uncertainty into the Department's regulatory efforts
 5 and burdens the Department with the onerous task of interpreting and applying the Rule. If the
 6 WOTUS Rule becomes effective, previous guidance documents, memoranda, and materials will
 7 be rendered inoperative. In addition, the Department is unaware of a firm commitment by the
 8 Agencies to provide guidance and training to assist with early implementation of the WOTUS
 9 Rule. This would hamper and delay the Department's ability to administer Surface Water Quality
 10 Bureau programs affected by the new WOTUS definition when questions arise. For example, on-
 11 the-ground investigations will be needed to delineate which waters are truly intermittent and
 12 which are ephemeral for compliance and enforcement purposes. Considering New Mexico has
 13 over 88,000 miles of non-perennial streams, and the vast majority of streams in the State do not
 14 have active gages to measure stream flows, these stream-specific investigations will be extremely
 15 resource-intensive. The Department already has received inquiries from various stakeholders
 16 about scope and implementation of the WOTUS Rule that cannot be answered due to
 17 uncertainties related to jurisdictional interpretation and enforcement. These are not insignificant
 18 burdens and may lead to additional costly litigation stemming from the Department's future
 19 interpretation the new WOTUS definition

20 **THE WOTUS RULE WILL ADVERSELY AFFECT THE NEW MEXICO ECONOMY**

21 24. The value of healthy surface waters in New Mexico is both cultural and economic. New
 22 Mexico's diverse waters recharge aquifers, provide important ecological and hydrological
 23 connections, support an amazing variety of wildlife and aquatic life, maintain drinking water
 24 resources, and sustain critical economic activity. The State's lakes, reservoirs, rivers, streams, and
 25 wetlands are essential to the future vitality of the agricultural, outdoor recreation and tourism
 26 industries.

27 25. The WOTUS Rule does not take into account the recreational economy impacts
 28 associated with poorer water quality influencing lake and river recreation as well as the many

1 rafting companies in New Mexico that depend on clean water for their business. Sixty-five
2 percent of New Mexicans participate in outdoor recreation activities each year. The New Mexico
3 Tourism Department reports that the State also has a high percentage of visitors who choose
4 outdoor recreation activities, such as river rafting, fly fishing, camping, boating and wildlife
5 viewing along the state's scenic waters. Visitors spent \$846 million on recreation in the state in
6 2017 and spending supports 13,000 direct jobs. In addition, the New Mexico Department of
7 Game and Fish reports there are 160,000 anglers who fish in New Mexico, spending \$268 million
8 on their activities annually. In recognition of the state's iconic natural landscapes and treasured
9 waters, desire to protect and conserve New Mexico's lands and waters, and potential for
10 developing a more robust outdoor recreation-based economy, the New Mexico Outdoor
11 Recreation Division was created by legislation during the 2019 legislative session. This Division
12 is tasked with increasing outdoor recreation-based economic development, tourism and
13 ecotourism, recruiting new outdoor recreation business to New Mexico, and promoting education
14 about outdoor recreation's benefits to enhance public health. Investing in outdoor recreation helps
15 promote healthy lifestyles and a high quality of life and attracts and sustains employers and
16 families. People do not want to recreate on polluted waters that cannot sustain healthy fish, bird
17 and wildlife populations. The outdoor recreation industry in New Mexico will be adversely
18 impacted by the gap in coverage when the WOTUS Rule goes into effect, to the detriment of jobs
19 and revenue in New Mexico.

20 26. The WOTUS Rule will also create economic burdens associated with new regulatory
21 gaps. Approximately 40% of New Mexicans rely on surface water as a drinking water source. The
22 regulatory gaps created by the ephemeral waters exemption and loss of wetlands protections
23 resulting from the WOTUS Rule will result in decreased water quality, as explained above. As a
24 result, the cost to treat drinking water and maintain drinking water infrastructure will increase.
25 The cost to treat surface water to drinking water standards depends on the quality of water
26 coming into the treatment plant, the technologies used, the size of the system, and the energy
27 source. Municipalities will likely need to invest in water treatment infrastructure and other costly
28 technologies, such as desalination and ultrafiltration, to provide clean, safe water for drinking.

Degraded water quality coming into the treatment plant, the need for improved and more costly treatment technologies and the less populated, rural nature of New Mexico as a whole will cause water treatment costs to increase substantially for many in the state and may force municipalities to choose lower water quality over necessary investments for clean and safe drinking water. In addition, enhanced treatment to remove pollutants causes increased water loss during treatment, which translates to less potable water in an increasingly arid State.

7 27. The Agencies failed to address cross-media implications of the WOTUS Rule. The
8 federal Resource Conservation and Recovery Act (RCRA) exempts wastewater treatment units
9 from regulation under RCRA if, in addition to a number of other conditions, those units discharge
10 effluent pursuant to a NPDES permit. 42 U.S.C. § 6903(27). Under the WOTUS Rule, many
11 facilities currently discharging pursuant to a NPDES permit would no longer be required to have
12 such a permit due to the jurisdictional change in the waters to which they discharge. As a result,
13 these facilities may be subject to regulation under RCRA for the first time, are likely to not have
14 performed an analysis of whether they are subject to RCRA, and would likely not be in
15 compliance with RCRA as a result. Given that a number of these facilities are industrial or
16 municipal facilities that have not contemplated regulation as a RCRA treatment, storage or
17 disposal facility (TSDF), this will present an additional economic hardship on these facilities in
18 New Mexico. If the industrial or municipal facilities are discharging into an ephemeral stream in
19 New Mexico and that ephemeral stream is no longer a WOTUS, these newly regulated TSDFs
20 may also be deemed as land disposing of waste – or hazardous waste – pursuant to the
21 implications of WOTUS.

CONCLUSION

23 28. The Department respectfully requests that the Court enjoin implementation of the
24 WOTUS Rule. If the rule takes effect, it will have a devastating impact on New Mexico's waters
25 and harm the New Mexico economy. The rule creates a regulatory vacuum that the State will be
26 incapable of filling to mitigate its harm.

27 29. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is
28 true and correct.

1 Executed on the 11th day of May 2020 in Santa Fe, New Mexico.

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Rebecca Roose